

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

DARRYL PATRICK LYNCH,

Plaintiff,

v.

MICHAEL McDONOUGH,

Defendant.

**REPORT
AND
RECOMMENDATION**
03-CV-0556A(F)

This action has been referred to the undersigned by the Hon. Richard J. Arcara, pursuant to 28 U.S.C. § 636(b)(1)(A) and (B), for all pre-trial matters. (Docket No. 11).

On October 21, 2003, Plaintiff filed a request for the Clerk of Court to enter a default judgment pursuant to Fed.R.Civ.P. 55(b). This request should be DENIED because (1) Plaintiff did not first seek entry of default pursuant to Fed.R.Civ.P. 55(a), a mandatory prerequisite to entry of a default judgment, *see Dow Chem. Pacific Ltd. v. Rascator Maritime, S.A.*, 782 F.2d 329, 335 (2d Cir. 1986); *Hirsch v. Innovation Intern., Inc.*, 1992 WL 316143, *1 (S.D.N.Y. Oct. 19, 1992); and (2) Defendant is not in default.

The summons in this matter was issued by the Clerk of Court on November 12, 2003, and the return of service executed by Plaintiff states that the Defendant was served on November 18, 2003. (Docket No. 13). On December 3, 2003, well within Defendant's time to answer, Defendant moved, *inter alia*, pursuant to Fed.R.Civ.P. 12(b)(6), to dismiss the Complaint for failure to state a claim. (Docket No. 8). As Fed.R.Civ.P. 12(a)(4)(A) defers service of an answer for 10 days following notice of the court's decision on a motion to dismiss, no answer was required during the pendency of Defendant's motion, and Defendant is therefore not subject to default pursuant to Fed.R.Civ.P. 55. *Finnegan v.*

Univ. of Rochester Med. Ctr., 180 F.R.D. 247, 249 (W.D.N.Y. 1998) (rejecting plaintiff's default motion where defendant timely moved to dismiss one claim of the complaint). "[S]ervice of a motion under Rule 12 suspends the movant's time to file a responsive pleading until ten days after the court's disposition of the motion." *Id.*

Accordingly, Plaintiff's motion for entry of a default judgment should be DENIED.

Respectfully submitted,

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: January 21, 2004
Buffalo, New York

Pursuant to 28 U.S.C. §636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the
ANY OBJECTIONS to this Report and Recommendation must be filed with the
Clerk of the Court within ten (10) days of service of this Report and Recommendation in
accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil
Procedure and Local Rule 72.3.

**Failure to file objections within the specified time or to request an extension
of such time waives the right to appeal the District Court's Order.** *Thomas v. Arn*, 474
U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir.
1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys
for the Petitioner and the Respondent.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: January 21, 2004
Buffalo, New York